

## CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
VOICE AND TDD (415) 904-5200  
FAX (415) 904-5400

# W-11b & 12b



Appeal Filed:	May 28, 2003
49 <sup>th</sup> Day:	Waived
Staff:	SLB- SF
Staff Report:	Nov. 21, 2003
Hearing Date:	Dec. 10, 2003

**COASTAL DEVELOPMENT PERMIT 2-03-025 STAFF REPORT**  
**and**  
**APPEAL STAFF REPORT A-2-MAR-03-019**  
**(SUBSTANTIAL ISSUE DETERMINATION + DE NOVO HEARING)**

<b>APPLICATION FILE NO.:</b>	A-2-MAR-03-019 and 2-03-025
<b>LOCAL GOVERNMENT:</b>	Marin County
<b>LOCAL DECISION:</b>	Approved
<b>LOCAL PERMIT NO.:</b>	CDP-01-26
<b>APPLICANT:</b>	Three Sons, LLC
<b>PROJECT LOCATION:</b>	23240, 23900, & 23115 Highway 1, Marshall, Marin County (APNs 104-140-02, 104-110-11, & 104-150-01)
<b>PROJECT DESCRIPTION:</b>	Various site improvements that would result in the restoration and continued operation of an existing restaurant and the provision of overnight accommodations and related facilities, including conversion of two existing one-story residences into four overnight guest units, reconstruction of four accessory structures, construction of underground water, sewage, and utility lines, a parking lot, an offsite sewage disposal system and well, and modifications to an existing water system.
<b>APPELLANTS:</b>	Coastal Commissioners Reilly and Woolley
<b>SUBSTANTIVE FILE</b>	
<b>DOCUMENTS:</b>	See Appendix A.
<b>STAFF RECOMMENDATION:</b>	Substantial Issue Exists; Approval of De Novo Permit with Conditions; Approval of Regular Permit with Conditions

## **EXECUTIVE SUMMARY**

### ***STAFF NOTE***

The project is located on tidelands and filled former tidelands of Tomales Bay, as well as on uplands adjacent to Tomales Bay near Marshall in Marin County and therefore falls under two coastal development permit jurisdictions. The portion of the project located on the upland area is within the County's coastal development permit jurisdiction. For this portion of the development, the County's Unit II Local Coastal Program (LCP) is the standard of review. The portion of the project on tidally influenced shoreline and filled former tidelands is within the Coastal Commission's (Commission's) original coastal development permit jurisdiction. Accordingly, the standard of review for the portion of the project in the Commission's original permit jurisdiction is the policies of the Coastal Act. There are separate motions for the portion of the project in the Commission's appeal jurisdiction and the Commission's retained permit jurisdiction. The Commission must vote separately on each item.

### **SUBSTANTIAL ISSUE**

The staff recommends that the Commission determine that the appeal raises a substantial issue with the consistency of the local government's action with the certified Local Coastal Program (LCP) and that the Commission hold a de novo hearing.

On May 13, 2003, the County approved a coastal development permit for portions of the project located within its jurisdiction. Part 1 of this report addresses the appeal of the County's permit approval.

The appellants contend that the project as approved by the County is inconsistent with the agricultural resource protection provisions of the Local Coastal Program (LCP) because the project as approved by the County does not conform to the uses allowed in the C-APZ zoning district.

The Commission staff analysis indicates that the appeal of the project as approved by the County raises significant questions regarding the approved project's consistency with the provisions of the certified LCP as they pertain to the protection of agricultural resources.

The motion to adopt the staff recommendation of substantial issue is found in Section 1.1.

### **DE NOVO COASTAL PERMIT APPLICATION AND REGULAR CALENDAR PERMIT APPLICATION: APPROVAL WITH CONDITIONS**

As noted above, on May 13, 2003, the County approved a coastal development permit for the portion of the project within its permit jurisdiction. On June 30, 2003, the applicant submitted a coastal development permit application to the Commission for authorization of the portion of the development within the Commission's permit jurisdiction. Part 2 of this report contains the staff recommendations and the Commission's findings and declarations to support approval of both the portion of the project in the Commission's permit jurisdiction and the portion of the project in the County's jurisdiction that was appealed to the Commission.

The staff recommends that the Commission approve the coastal development permits for the portions of the development located in both the County's permit jurisdiction and the Commission's permit jurisdiction, with the conditions specified in Part 2, Sections 3.3 and 3.4 and summarized below.

**Special Condition 1** limits use of the proposed well to the operations of Nick's Cove and agricultural activities on APN 104-110-11. **Special Condition 2** limits the use of the proposed sewage disposal system to serving the operations of Nick's Cove; however, **Special Condition 2** also allows, in the case that adjacent residential development located at 23065, 23075, 23085, and 23099 Highway 1 cannot comply with County or State sewage disposal system standards, the proposed sewage disposal system to serve those residences. **Special Condition 2** also prohibits the use of the sewage disposal system to support new or expanded development on the project site or any other property.

**Special Condition 3** requires the applicant to submit for the review and approval of the Executive Director prior to issuance of the permits, a geotechnical report for the proposed development. It further requires that all the final design and construction plans conform to the geotechnical consultant's recommendations. **Special Condition 4** requires the landowner to assume the risks of any losses associated with the proposed development due to hazards of the property. **Special Condition 5** requires that a deed restriction be recorded informing future buyers of the property of the special conditions of these permits.

**Special Condition 6** requires that the final project plans provide for a continuous public access way reserved for exclusive public access use free of charge to the pier, dock, fishing shelter, boat mooring, and four boat slips. **Special Condition 6** also requires that the commercial uses of the proposed fishing shelter be limited to the 200 square feet of the shelter. **Special Condition 7** requires the applicant, consistent with the terms of their proposed project description, to record an offer to dedicate (1) a vertical public access easement over the pier, dock, fishing shelter, boat mooring, and boat slips and (2) a lateral access easement over the area seaward of the bulkhead, excluding the footprint of the interior area of the restaurant and cottages but including the exterior deck of the restaurant. Both of the offers to dedicate access easements must reflect the access requirements stated in **Special condition 6**.

**Special Condition 8** requires the applicant to submit revised plans which eliminate the proposed bayside decking on Cottages 1, 2, 3, 4, and 5, as well as proposed riprap in the onsite blue line stream, and development located within the delineated onsite wetland and within 100 feet of the wetland. **Special Condition 9** requires the applicant to submit project plans for the proposed bulkhead repair, and prohibits the repairs from resulting in any further seaward encroachment of the existing bulkhead.

**Special Condition 10** requires the applicant to survey and monitor the site prior to and during construction for California red-legged frogs. **Special Condition 11** requires the applicant to submit prior to issuance of the permits, a landscaping plan that removes any proposed invasive exotic plants and demonstrates that vegetation will screen the proposed 10,000 gallon water tanks. **Special Condition 11** also prohibits the use of invasive exotic plants on the project site for the life of the development authorized under these permits.

**Special condition 12** and **Special Condition 13** require the applicant to submit prior to the issuance of these permits a Construction Water Quality Protection Plans and a Post Construction Storm Water Pollution Prevention Plan.

As conditioned, the staff recommends that the Commission find the proposed development consistent with the policies of the County's certified LCP and the Coastal Act.

The motion to adopt the staff recommendation of approval with conditions for the portion of the development in the County's permit jurisdiction is found in Section 1.2. The motion to adopt the staff recommendation of approval with conditions for the portion of the development in the Commission's permit jurisdiction is found in Section 1.3.

<b>1.0</b>	<b>Staff Recommendation, Motions, and Resolutions.....</b>	<b>6</b>
1.1	Substantial Issue on Appeal No. A-2-MAR-03-019 .....	6
1.2	Coastal Development Permit No. A-2-MAR-03-019 .....	6
1.3	Coastal Development Permit No. 2-03-025 .....	7
<b>2.0</b>	<b>FINDINGS AND DECLARATIONS.....</b>	<b>7</b>
2.1	Local Government Action.....	7
2.2	Filing of Appeal.....	7
2.3	Appellants' Contentions.....	8
2.4	Appeal Process .....	8
2.5	Standard of Review .....	9
2.6	Project Location and Site Description .....	10
2.7	Project Site History .....	11
2.8	Project Description .....	11
2.9	Allegations that Raise a Substantial Issue .....	12
<b>3.0</b>	<b>STAFF RECOMMENDATIONS.....</b>	<b>15</b>
3.1	Coastal Development Permit No. A-2-MAR-03-019 .....	15
3.2	Coastal Development Permit No. 2-03-025 .....	15
3.3	Standard Conditions of Permit No. 2-03-025 and A-2-MAR-03-019 .....	15
3.4	Special Conditions .....	16
<b>4.0</b>	<b>FINDINGS AND DECLARATIONS.....</b>	<b>24</b>
4.1	Standard of Review .....	24
4.2	Background .....	24
4.3	Project Location, Site Description, & Project Site History .....	24
4.4	Project Description .....	24
4.5	Permit Authority, Extraordinary Methods of Repair and Maintenance.....	26
4.6	Agricultural Resources.....	26
4.7	Geologic Stability/Hazards .....	29
4.8	Public Access and Public Recreation .....	31
4.9	Wetlands.....	35
4.10	Environmentally Sensitive Habitats and Water Quality.....	39
4.11	Water Quality .....	41
4.12	Stream Protection .....	46
4.13	Visual Resources .....	46
<b>5.0</b>	<b>CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) .....</b>	<b>47</b>

## **1.0 STAFF RECOMMENDATION, MOTIONS, AND RESOLUTIONS**

Following public hearing, staff recommends the Commission adopt the following resolutions and findings. The appropriate motion to introduce the resolution and a staff recommendation is provided just prior to each resolution.

### **1.1 Substantial Issue on Appeal No. A-2-MAR-03-019**

The staff recommends that the Commission determine that a substantial issue exists with respect to the grounds on which the appeal has been filed. The proper motion is:

#### **MOTION**

*I move that the Commission determine that Appeal No. A-2-MAR-03-019 raises NO substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.*

#### **STAFF RECOMMENDATION**

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue, and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

#### **RESOLUTION TO FIND SUBSTANTIAL ISSUE**

The Commission hereby finds that Appeal No. A-2-MAR-03-019 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency of the local action with the certified Local Coastal Program and/or the public access policies of the Coastal Act.

### **1.2 Coastal Development Permit No. A-2-MAR-03-019**

The staff recommends that the Commission approve Coastal Development Permit No. A-2-MAR-03-019 subject to the conditions in Sections 3.3 and 3.4 below.

#### **Motion:**

*I move that the Commission approve Coastal Development Permit No. A-2-MAR-03-019 subject to conditions pursuant to the staff recommendation.*

#### **Staff Recommendation of Approval:**

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

#### **Resolution to Approve the Permit:**

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in

conformity with the policies of the certified LCP. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

### **1.3 Coastal Development Permit No. 2-03-025**

The staff recommends that the Commission approve Coastal Development Permit No. 2-03-025 subject to the conditions in Sections 3.3 and 3.4 below.

***Motion:***

*I move that the Commission approve Coastal Development Permit No. 2-03-025 subject to conditions pursuant to the staff recommendation.*

***the Staff Recommendation of Approval:***

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Resolution to Approve the Permit:***

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

## **PART 1 - SUBSTANTIAL ISSUE**

### **2.0 FINDINGS AND DECLARATIONS**

The Commission hereby finds and declares:

#### **2.1 Local Government Action**

On May 6, 2003, Marin County conditionally approved Coastal Development Permit CDP-01-26 authorizing the approved development.

#### **2.2 Filing of Appeal**

The Commission received the Notice of Final Local Action from Marin County on May 13, 2003, and the Commission's appeal period began on May 14, 2003, the first working day following the date that the Commission received the Notice of Final Local Action. In accordance with Section 13110 of the Commission's regulations, the 10-working-day appeal period ran from May 14 to May 28, 2003. On May 28, 2003, within the 10-working day

Commission appeal period, the appellants (Commissioners Reilly and Woolley) filed an appeal (Exhibit 5, Appeal by Commissioners Reilly and Woolley). On May 28, 2003, the Commission sent notice of the appeal to Marin County. Pursuant to Section 30261 of the Coastal Act, the appeal hearing must be set within 49 days from the date that the appeal of a locally issued coastal development permit is filed.

In accordance with the California Code of Regulations, on May 28, 2003, staff requested all relevant documents and materials regarding the subject approval from the County to enable staff to analyze the appeal and prepare a recommendation as to whether a substantial issue exists. The regulations provide that a local government has five working days from receipt of such a request from the Commission to provide the relevant documents and materials. The County permit file information had not been received as of June 20, 2003, the day of the mailing of staff reports to the Commission and interested parties on items on the Commission's July 2003 meeting agenda. Therefore, the requested information was not received in time for the staff to review the information for completeness or prepare a recommendation on the substantial issue question. Consistent with Section 13112 of the California Code of Regulations, since the Commission did not receive the requested documents and materials, Commission staff was prepared to recommend that the Commission open and continue the hearing. Nevertheless, on June 6, 2003, the applicant waived his right to a hearing within 49 days of the date the appeal was filed, obviating the need to open and continue a hearing on the July agenda.

### **2.3 Appellants' Contentions**

The Commission received appeals by Commissioners Mike Reilly and John Woolley on May 28, 2003. The appellants assert that the project as approved by the County does not conform to the uses allowed in C-APZ zoned districts. Exhibit 5 contains the full text of the appellants' contentions. Specifically, substantial issues of consistency have been raised with regards to the County's LCP Implementation Plan (IP) (Exhibit 5, Appeal by Commissioners Reilly and Woolley). .

### **2.4 Appeal Process**

After certification of local coastal programs, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits (Coastal Act Section 30603).

Coastal Act Section 30603 provides, in applicable part, that an action taken by a local government on a coastal development permit application may be appealed to the Coastal Commission for certain kinds of developments, including the approval of developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea, or within 300 feet of the mean high tide line or inland extent of any beach or top of the seaward face of a coastal bluff; or in a sensitive coastal resource area; or located within 100 feet of any wetland, estuary, or stream. Developments approved by counties may be appealed if they are not designated as the "principal permitted use" under the certified LCP. Developments that constitute a major public works or a major energy facility may also be appealed, whether they are approved or denied by the local government.

The approved development is located within 300 feet of the mean high tide line and includes development not designated as the "principally permitted use," such as a sewage disposal system and well for off-site uses and thus is within the Commission's appeal jurisdiction as defined in



Section 30603 of the Coastal Act. Pursuant to Section 30603 of the Coastal Act, the grounds for an appeal for development in this location is limited to the allegation that the development does not conform to the standards set forth in the certified LCP.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue is raised with respect to the grounds on which the appeal has been filed pursuant to Section 30603. If the staff recommends “substantial issue” and no Commissioner objects, the substantial issue will be considered moot, and the Commission may proceed directly to a de novo hearing on the merits of the project at the same or a subsequent meeting.

If the staff recommends “no substantial issue” or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. The only persons eligible to testify before the Commission on the substantial issue question are the applicant, persons who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding the substantial issue question must be submitted to the Commission or the Executive Director in writing.

It takes a majority of the Commissioners present to find that no substantial issue is raised. Unless it is determined that the project raises no substantial issue, the Commission will conduct a full de novo public hearing on the merits of the project at the same or subsequent hearing. If the Commission conducts a de novo hearing on the appeal, the applicable test under Coastal Act Section 30604 would be whether the development is in conformance with the certified Local Coastal Program and the public access and recreation policies of the Coastal Act.

## 2.5 Standard of Review

Public Resources Code Section 30625(b) states that the Commission shall hear an appeal unless it determines:

*With respect to appeals to the Commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.*

The term *substantial issue* is not defined in the Coastal Act or its implementing regulations. The Commission’s regulations simply indicate that the Commission will hear an appeal unless it “finds that the appeal raises no significant question.” (Commission Regulations, Section 13115(b)). In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government’s decision for future interpretation of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

If the Commission chooses not to hear an appeal, appellant nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to California Code of Civil Procedure, Section 1094.5.

## **2.6 Project Location and Site Description**

The project site is comprised of three separate parcels located at 23240, 23115, and 23900 Highway 1 on the eastern shore of Tomales Bay in Marshall, Marin County. Miller Park, a small County park developed with parking, a fishing pier, and boat launch facilities, lies immediately adjacent to and north of the project site. The shoreline directly south of the site is undeveloped. Many acres of open coastal agricultural land used primarily for cattle or dairy grazing occupy the rolling hillsides to the north, east, and south of the site (Exhibit 1, Location Map, Exhibit 2, Vicinity Map, & Exhibit 3, Parcel Map).

The project site is located both within Marin County's permit jurisdiction and the Commission's original permit jurisdiction (Exhibit 4, Boundary Determination). APN 104-150-01 (Parcel 1) and approximately one third of APN 104-140-02 (Parcel 2) are located within the Coastal Commission's original permit jurisdiction. The remaining portion of Parcel 2 and all of APN 104-110-11 (Parcel 3) are located within the County's coastal development permit jurisdiction.

Parcel 1 and Parcel 2 create the primary project site and are both owned by the project applicant. Parcel 1, a 5.72 acre parcel zoned C-C-P (Coastal, Commercial, Planned District), lies west of Highway 1. Approximately 3.8 acres of Parcel 1 are subject to tidal action, and the remaining 1.92 acres are dry land. Elevation ranges from above sea level at the highway to below low tide at the end of an existing 385-foot pier and 450 square-foot dock, which extends from the highway across the parcel over Tomales Bay. In addition to the pier and dock, Parcel 1 is developed with a 2992 square-foot restaurant on pilings with a 907 square-foot deck and five vacant single-story cottages ranging in size from 288 square feet to 792 square feet, which also rest on pilings.

Parcel 2, a 4.11 acre parcel zoned C-RMPC (Coastal, Residential Multiple, Planned Commercial District), is located east of Highway 1 directly across from Parcel 1. The center of the parcel is a relatively flat alluvial valley, flanked by northern and southern sloping grassy hillsides. The elevation ranges from 20 feet adjacent to Highway 1 up to 60 feet at the outer edges of the hillsides. An unnamed seasonal blueline stream cuts across the middle of the parcel, flowing under Highway 1 and onto the intertidal mudflat beneath the existing restaurant to empty into Tomales Bay. A berm made of oyster shells deposited over the years surrounds three sides of the creek near the highway. Immediately adjacent to and south of the creek lies a 1284 square-foot two-story vacant structure that once served as a residence. Upslope from the structure sit two 10,000-gallon water storage tanks that serve the site and four single-family residences located offsite south of Nick's Cove on the shoreline of Tomales Bay. On the north side of the creek the parcel is developed with two one-story residences (960 square feet and 1158 square feet), four ancillary structures totaling 500 square feet, and informal parking.

Parcel 3, a 280-acre agricultural property zoned C-APZ-60 (Coastal, Agricultural Production Zone, Planned District, one primary dwelling unit per 60 acres maximum density), lies immediately northeast of the primary project site and is owned by Terry Zimmerman.

Currently, Parcel 3 is under a Land Conservation Contract (Williamson Act) with the County and is being used for livestock grazing. The property is developed with one residential unit and a variety of agricultural related structures. Through its action on CDP 01-26, the County approved development on approximately three acres of grassland in the southwestern portion of the property and an area in the southeastern portion (Exhibit 6, Site Photographs).

## **2.7 Project Site History**

The primary project site is a small settlement consisting of modest commercial and residential structures and an old fishing/boating pier, as described in more detail above, called Nick's Cove, which was part of the local fishing community established in the 1930s. Nick's Cove is one of the last remaining of many settlements once established on Tomales Bay, which catered to tourists after the advent of the automobiles and good roads, particularly after the opening of the Golden Gate Bridge in 1937. The restaurant served the local fishermen and farmers for over 60 years. According to the Historic Analysis prepared by Dewey Livingston, Historian, and submitted with the application, the site was originally developed by Nick Kojich, an ambitious immigrant and commercial fishermen, who moved the various cottage structures now along the shoreline by barge from Pierce Ranch across Tomales Bay and placed them on pilings on the beach, adjacent to the road. Mr. Kojich also built the pier, with a small fishing shelter at the end (since destroyed), from material salvaged from the old pier across the Bay.

In the early 1930s, Mr. Kojich converted an old herring plant into a small seafood restaurant (which bears his name). Later, other family members joined Nick and his wife in the operation of business. In 1950, the restaurant burned down and a new one was built on the same site. During the 1950s and sixties small boats reprinted at the site and fishermen and visitor stopped their boats at Nick's Cove. In summary, the site evolved as a popular visitor-serving destination that attracted people from the San Francisco Bay area, the Sacramento Valley, and beyond (Livingston 2000).

## **2.8 Project Description**

The project consists of both new development and repair and maintenance activities that would result in the restoration and continued operation of Nick's Cove restaurant and the provision of overnight accommodations and related facilities that would be associated with the restaurant. As noted above, the development being proposed under CDP 2-03-025 and which was approved by the County under CDP 01-26 is located on three separate parcels and falls within both the County's jurisdiction and the Coastal Commission's original permit jurisdiction (Exhibit 7, Project Plans & Cross-sections). Below is a description of the approved development under CDP 01-26 divided by parcel, which is being considered on appeal before the Commission. The project description for CDP 2-03-025 is located in Part 2 under Section 4.4.

The County approved development located on Parcel 2 consists of the following:

- Conversion of a one-story residence, totaling 960 square feet, into two over-night guest units and the addition of decks to the units.
- Construction of a new water system appurtenant to the off-site well to serve the commercial development, including two new 10,000-gallon concrete water storage tanks and a distribution system to serve the proposed project;

- Construction of a 3,000-square-foot sand filter system and 3,000-gallon sewage holding tank north of the parking site;
- Construction of underground water, sewage lines, and utility lines;
- Construction of a new parking area;
- Construction of decomposed granite pedestrian walkways, drainage grading, and landscaping improvements with an irrigation system, including a small orchard and terraced vegetable, herb, and flower gardens to be used in the restaurant and lodging operation;
- Preservation of existing signs and construction of additional signs for identification and pedestrian direction and safety;
- Reconstruction of three accessory structures to be used as storage, a potting shed, a tool shed, and a laundry room totaling approximately 410 square feet; and
- Modifications to the existing water system (consisting of leased spring water from “Lands of Poncia”, APN 104-110-10, two water storage tanks and distribution lines) which include: (a) repairing the existing transmission lines within existing easements to provide fire protection, irrigation, and maintain domestic service to four single-family residences located off-site, south of the project site and across Highway 1 that are not part of the subject project; (b) capping transmission lines to the existing structures on the project site; (c) constructing an accessory structure to house chlorinating facilities, and (d) installing an irrigation service off the existing main to supply irrigation for landscaping to the project site.

The County approved development on Parcel 3 includes:

- Replacement of the existing on-site sewage disposal system with the construction of a new sewage disposal system with leach fields and a 3,000-gallon siphon chamber and shallow pressurized trenches divided into four sections totaling approximately three acres located approximately 3,600 feet northeast of the primary project site to serve the commercial operation;
- Construction of a new 38 gallon per minute well located approximately 2 miles northeast of the primary project site and to provide water service to the commercial site as well as the agricultural parcel (Parcel 3) with underground water lines to the proposed two new 10,000-gallon concrete water storage tanks on the east side of the Nick’s Cove project site; and
- Construction of appurtenant underground sewage and water pipelines within utility easements over the “Lands of Zimmerman” (Parcel 3) to serve commercial uses at the Nick’s Cove site.

The restoration of the existing structures would retain their exterior appearance. Proposed exterior colors and materials would be similar to those existing.

## **2.9 Allegations that Raise a Substantial Issue**

The following is the appellants’ contention, which raises a substantial issue regarding the approved project’s conformance with the County's certified LCP.

## 2.9.1 Agricultural Resources

### **Contention**

The appellants contend that that the approved sewage disposal system and well on Parcel 3 do not conform to the uses allowed on C-APZ zoned land under the certified County of Marin Local Coastal Program (LCP).

### **LCP Policy**

LUP Implementation Plan Section 22.57.030 states in relevant part:

*22.57.031 Purpose. The purpose of the agricultural production zone is to preserve lands within the zone for agricultural use. The principal use of lands in the C-APZ districts shall be agricultural. Development shall be accessory, incidental, or in support of agricultural land uses, and shall conform to the policies and standards as set forth in this chapter.*

*22.57.032 Principal Permitted Uses. The following uses are permitted in all C-APZ districts subject to an approved master plan:*

*1. Agricultural Uses. For the purposes of the coastal agricultural production zone, agricultural uses are defined as uses of land to grow and/or produce agricultural commodities for commercial purposes, including:*

- a. Livestock and poultry: cattle, sheep, poultry, goats, rabbits, horses unless they are the primary animals raised;*
- b. Livestock and poultry products: milk, wool, eggs;*
- c. Field, fruit, nut and vegetable crops: hay, grain, silage, pasture, fruits, nuts and vegetables;*
- d. Nursery products: nursery crops, cut plants.*

*2. One single-family dwelling per parcel. Parcel is defined as all contiguous assessor's parcels under common ownership (unless legally divided as per Title 20, Marin County Code).*

*3. Accessory structures or uses appurtenant and necessary to the operation of agricultural uses, other than dwelling units of any kind; but, including barns, fences, stables, corrals, coops and pens, and utility facilities.*

*4. Bed and breakfast operations as defined in Section 22.02.103, for such operations which offer or provide not more than three guest rooms.*

*22.57.033 Conditional Uses. The following uses are permitted in all coastal agricultural production zone districts, subject to the securing of a use permit in each case. When it is determined by the planning director that any of the following uses constitute a major land use change, a master plan submitted in accordance with Chapter 22.45 may be required.*

- 1. Farmworker housing;*
- 2. Mobile homes which are used exclusively for employees of the owner who are actively and directly engaged in the agricultural use of the land;*
- 3. Hog ranch;*
- 4. Veterinary facilities;*
- 5. Fish hatcheries and rearing ponds;*
- 6. Stabling of more than five horses on ranches where horses are the primary or only animals raised;*

7. *Raising of other food and fiber producing animals not listed under subsection (1) of Section 22.57.032;*
8. *Planting, raising or harvesting of trees for timber, fuel or Christmas tree production;*
9. *Facilities for processing or retail sale of agricultural products;*
10. *Greenhouses;*
11. *Commercial storage and sale of garden supply products;*
12. *Water conservation dams and ponds;*
13. *Mineral resource production;*
14. *Game or nature preserve or refuge;*
15. *Public or private recreational activities, such as hunting, fishing and camping;*
16. *Bed and breakfast operations as defined in Section 22.02.103, which provide four but not more than five guest rooms;*
17. *Construction or alteration of gas, electric, water, communication or flood control facilities, unrelated to an agricultural use, as approved by the appropriate governmental agencies;*
18. *Dump.*

### **Analysis**

The approved development includes the following development on the C-APZ-60 zoned Parcel 3: (1) the construction of a new sewage disposal system with leach fields, 3000 gallon siphon chamber and shallow pressurize trenches to serve the offsite existing operations of Nick's Cove; (2) the construction of a new 38 gallon per minute well to serve the existing offsite operations of Nick's Cove, as well as agricultural uses on Parcel 3; and (3) the construction of appurtenant underground sewage and water pipelines to connect the sewage disposal system and well to the Nick's Cove offsite.

Zoning Code Section 22.56.030 enumerates the types of principally permitted uses and conditional uses allowed within the C- APZ zoning district as listed above. The County's administrative record is unclear regarding how the approved development on agricultural lands, which would partially serve an offsite nonagricultural use, is approvable under the C-APZ zoning. Therefore, the Commission finds that the appeal raises a substantial issue regarding the approved development's conformance with the provisions of the certified LCP addressing agricultural resources.

## **PART 2 – DE NOVO REVIEW OF PROJECT IN COMMISSION'S APPEAL JURISDICTION AND PERMIT OF PROJECT IN COMMISSION'S ORIGINAL PERMIT JURISDICTION**

### **STAFF NOTE**

If the Commission finds that the appeal addressed in Part 1 above raises a substantial issue with respect to the conformance of the development as approved by Marin County with the policies of the certified LCP and the public access policies of the Coastal Act, the Commission must conduct a de novo review for the portion of the project located in the County's permit jurisdiction as proposed by the applicant. The Commission must also review a coastal

development permit application for the portion of the same project located in the Commission's original permit jurisdiction. The following staff recommendation and findings (Part 2 of this staff report) are for both the de novo review of the portion of the project located in the County's permit jurisdiction and the permit application for the portion of the project located in the Commission's original permit jurisdiction. There are separate motions for the portion of the project in the Commission's appeal jurisdiction and the Commission's retained permit jurisdiction. The Commission must vote separately on each item. Because the de novo review and the original Commission jurisdiction permit have two different standards of review (see Section 4.1 below), the findings in Section 4.0 below incorporate both standards of review.

Although the project spans two jurisdictions and must be reviewed as two separate coastal development permit applications, the development functions as a single project. Since review of the impacts of the portion of the project located in one jurisdiction without the analysis of the impacts of the project in the other jurisdiction would be impractical, the entire project is recommended for Commission action at one time.

### **3.0 STAFF RECOMMENDATIONS**

#### **3.1 Coastal Development Permit No. A-2-MAR-03-019**

The staff recommends that the Commission approve Coastal Development Permit No. A-2-MAR-03-019 subject to the conditions specified in Sections 3.3 and 3.4 below.

#### **3.2 Coastal Development Permit No. 2-03-025**

The staff recommends that the Commission approve Coastal Development Permit No. 2-03-025 subject to the conditions specified in Sections 3.3 and 3.4 below.

#### **3.3 Standard Conditions of Permit No. 2-03-025 and A-2-MAR-03-019**

1. Notice of Receipt and Acknowledgment. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Interpretation. Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
4. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

### 3.4 Special Conditions

The special conditions applicable to A-2-MAR-03-019 shall be 1, 2, 3, 4, 5, 8, 10, 11, 12, and 13.

The special conditions applicable to 2-03-025 shall be 3, 4, 5, 6, 7, 8, 9, 11, 12, and 13.

1. Use of Well

The approved well to be located on APN 104-110-11 shall only be used to serve: (1) the existing visitor serving operation of Nick's Cove consisting of a restaurant, 11 overnight guest units, and one employee unit; and (2) agricultural activities on APN 104-110-11.

2. Use of Sewage Disposal System

The approved sewage disposal system to be located on APN 104-110-11, consisting of leach fields, a 3000-gallon chamber and shallow pressure trenches, and appurtenant underground sewage pipelines shall only be used to serve: (1) the existing visitor serving operation of Nick's Cove consisting of a restaurant, 11 overnight guest units, and one employee unit; and (2) the existing adjacent development located at 23065, 23075, 23085, and 23099 Highway 1, if such existing development cannot comply with County or State sewage disposal system standards. The approved sewage disposal system may not be used to support new or expanded development on the project site or any other property.

3. Conformance of Design and Construction Plans to Geotechnical Report Geologic Hazard

A. **PRIOR TO THE ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. 2-03-025 & A-2-MAR-03-019**, the applicant shall submit, for the Executive Director's review and approval, a geotechnical report for the proposed development. The geotechnical report shall include a fault hazard study and a liquefaction analysis and shall evidence, to satisfaction of the Executive Director, that it has been prepared in conformance with all the following: (1) all of the requirements found in the "Guidelines for Engineering Geology Reports" set forth by the State Board for Geologists and Geophysicists; (2) the "Geologic Guidelines for Earthquake and/or Fault Hazard Reports" set forth by the State Board for Geologists and Geophysicists; (3) the "Recommended Procedures for Implementation of DMG Special Publication 117 Guidelines For Analyzing and Mitigating Liquefaction Hazards in California, March 1999"; and (4) seismic design criteria identified by the International Building Code.

B. If the geotechnical report prepared in accordance with Subsection A finds evidence of a mixed ordinary geologic hazard consisting of:

- 1) a fault trace with Holocene movement;
- 2) a factor of safety against liquefaction-induced settlement, surface manifestation of liquefaction, or lateral spread of less than 1.3; or
- 3) a factor of safety against surficial or deep-seated slope failure of less than 1.5 (static) or 1.2 (pseudostatic, assuming a seismic coefficient of 0.15 g); or estimated seismic displacement of more than 50 cm,

The permittee shall within 30 days of such determination, and prior to issuance of CDP 2-03-025 & A-2-MAR-03-019, submit an application to the Commission for coastal development permit amendments of CDP 2-03-025 & A-2-MAR-03-019 for appropriate



modifications to the project plans adequate to minimize risks associated with such extraordinary hazards.

- C. All final design and construction plans, including foundations, grading and drainage plans, shall be consistent with all recommendations contained in the geotechnical report required in Special Condition 1 (A). **PRIOR TO THE ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. 2-03-025 & A-2-MAR-03-019**, the applicant shall submit, for the Executive Director's review and approval, evidence that an appropriate licensed professional has reviewed and approved all final design and construction plans and certified that each of those final plans is consistent with all of the recommendations specified in the above-referenced geologic evaluation required by the California Coastal Commission for the project site.
- D. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to coastal development permits 2-03-025 & A-2-MAR-03-019 unless the Executive Director determines that no amendment is legally required.

4. Assumption of Risk, Waiver of Liability and Indemnity

By acceptance of permits 2-03-025 & A-2-MAR-03-019, the applicant acknowledges and agrees:

- 1. that the site may be subject to hazards from seismic activity, flooding, storm surge, waves, and tsunami;
- 2. to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development;
- 3. to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and
- 4. to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amount paid in settlement arising from any injury or damage due to such hazards.

5. Deed Restriction

**PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. 2-03-025 & A-2-MAR-03-019**, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against the parcel(s) governed by permits 2-03-025 & A-2-MAR-03-019 deed restrictions, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to permits 2-03-025 & A-2-MAR-03-019, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of permits 2-03-025 & A-2-MAR-03-019 as covenants, conditions and restrictions on the use and

enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of permits 2-03-025 & A-2-MAR-03-019 shall continue to restrict the use and enjoyment of the subject property so long as either permits 2-03-025 & A-2-MAR-03-019 or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

6. Public Access

A. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT NO. 2-03-**

**025**, the applicant shall submit for Executive Director review and approval revised final project plans that provide for a continuous public accessway, reserved for exclusive public access use, over the pier, exterior restaurant deck, beach, dock, fishing shelter, mooring area and four boat slips, that incorporates the following criteria. The required public access shall:

1. include a permanent sign, minimum size of 12 inches by 18 inches, which prominently conveys the exclusive availability of the accessway for public use and the hours which it shall be open for public use;
2. be exclusively available for public use without charge daily (7 days a week) during daylight hours (i.e., from sunrise to sunset times as routinely published in newspapers and in tide tables) and after sunset at all times when the restaurant is open for business;
3. be designed to meet the Americans with Disabilities Act (ADA) accessibility guidelines for wheelchair access;
4. not be gated, chained, or otherwise closed off during the time period when it is required to be available for exclusive public use free of charge; and
5. not be impeded by other uses. Commercial uses within the fishing shelter shall be limited to the interior of the 200 square-foot shelter.

B. The permittee shall undertake development in accordance with the approved final plan. The permittee shall complete construction of the public access improvements required by Special Condition 6.A and shown on the approved final plan within 180 days from the issuance of this coastal development permit. Any proposed changes to the approved final plan shall be reported to the Executive Director. No changes to the approved final plan shall occur without a Commission amendment to coastal development permit 2-03-025 unless the Executive Director determines that no amendment is legally required.

7. Lateral and Vertical Public Access Easements

A. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT NO. 2-**

**03-025**, and consistent with the terms of the applicant's proposed project description, the landowner shall execute and record a document, in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private association approved by the Executive Director an easement for public pedestrian access. The document shall provide that the offer of dedication shall not be used or construed to allow anyone, prior to the acceptance of the offer, to interfere with any rights of public

access acquired through use or legislative authorization which may exist on the property. The area of dedication shall start at Highway 1 and extend over the pier, dock, fishing shelter, boat mooring, and boat slips as generally depicted on Exhibit 8. The recorded document shall provide for public access consistent with the requirements of Special Condition 6. The recorded document shall include legal descriptions of both the entire project site and the area of dedication. The document shall be recorded free of prior liens and any other encumbrances which the Executive Director determines may affect the interest being conveyed. The offer shall run with the land in favor of the People of the State of California, binding all successors and assignees, and shall be irrevocable for a period of 21 years, such period running from the date of recording.

- B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT No. 2-03-025**, and consistent with the terms of the applicant's proposed project description, the landowner shall execute and record a document, in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private association approved by the Executive Director an easement for lateral public access and passive recreational use along the shoreline. The document shall provide that the offer of dedication shall not be used or construed to allow anyone, prior to the acceptance of the offer, to interfere with any rights of public access acquired through use or legislative authorization which may exist on the property. The area of dedication shall consist of the portion of APN 104-150-01 as generally depicted on Exhibit 8 that is seaward of the bulkhead, or the Mean High Tide Line where there is no bulkhead, excluding the footprint of the interior area of the restaurant and cottages but including the exterior deck of the restaurant. The recorded document shall provide for public access consistent with the requirements of Special Condition 6. The recorded document shall include legal descriptions of both the entire project site and the area of dedication. The document shall be recorded free of prior liens and any other encumbrances which the Executive Director determines may affect the interest being conveyed. The offer shall run with the land in favor of the People of the State of California, binding all successors and assignees, and shall be irrevocable for a period of 21 years, such period running from the date of recording.
- C. Any future development that is proposed to be located either in whole or in part within the areas described in the recorded offers of dedication shall require a Commission amendment, approved pursuant to the provisions of 14 CCR § 13166, to this coastal development permit. This requirement shall be reflected in the provisions of each of the offers.

8. Revised Plans

- A. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT NO. 2-03-025**, the applicant shall submit revised plans to the Executive Director for review and approval. The revised plans shall show the following changes to the project:
1. Architectural revisions

- 1) Proposed development consisting of bayside decking on Cottages 1, 2, 3, 4 and 5 shall be removed.
- 2) Proposed development consisting of the pedestrian bridge, granite pedestrian pathways, and seating area located within the wetland as depicted on Exhibit 9 shall either be relocated outside the wetland and wetland buffer as generally depicted on Exhibit 9 or eliminated from the proposed project.
- 3) proposed development consisting of the pedestrian bridge, granite pathways, the terraced garden, driveway construction, and four ancillary structures within 100 feet of the wetland as depicted on Exhibit 9 shall either be relocated outside the wetland and wetland buffer as generally depicted on Exhibit 9 or eliminated from the proposed project.
- 4) The proposed development consisting of riprap in the blue line stream as generally depicted on Exhibit 11 shall be eliminated from the proposed project.

B. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT NO. A-2-MAR-03-019**, the applicant shall submit revised plans to the Executive Director for review and approval. The revised plans shall show the following changes to the project:

1. Architectural revisions

- (a) proposed development consisting of consisting of the pedestrian bridge, granite pathways, the terraced garden, driveway construction, and for ancillary structures within 100 ft. of the wetland as depicted on Exhibit 9 shall be removed.

C. The revised plans shall, prior to submittal to the Executive Director, be reviewed and certified by a qualified professional to ensure that they are consistent with the Commission's approval.

D. The permittee shall undertake development in accordance with the approval final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to coastal development permits 2-03-025 & A-2-MAR-03-019 unless the Executive Director determines that no amendment is legally required.

9. Bulkhead

- A. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT NO. 2-03-025**, the applicant shall submit, for the review and approval of the Executive Director, project plans for the proposed bulkhead repair.
- B. The proposed bulkhead repair shall not result in the seaward encroachment of the existing bulkhead.
- C. The permittee shall undertake development in accordance with the approval final plans. Any proposed changes to the approved final plans shall be reported to the

Executive Director. No changes to the approved final plans shall occur without a Commission amendment to coastal development permit 2-03-025 unless the Executive Director determines that no amendment is legally required.

10. California Red Legged Frog

- A. **TWO DAYS PRIOR TO COMMENCEMENT OF CONSTRUCTION ON PARCEL 2**, the applicant shall survey the construction area on Parcel 2 for California red-legged frogs. The surveys shall be conducted by a qualified biologist in accordance with USFWS protocol (USFWS 1997).
- B. A qualified biological monitor experienced with the California red-legged frog shall be present at this location during all construction activities. The biological monitor shall have the authority to halt all construction activities as necessary to protect habitat and individual animals. Construction within these locations is prohibited at any time that a California red-legged frog is present in the construction area. If a California red-legged frog is found within the construction area, no work shall occur until the frog has moved outside of the construction area. If the California red-legged frog will not move outside the construction area on its own, the biological monitor shall consult the U.S. Fish and Wildlife Service for further instructions.

11. Landscaping

- A. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT NO. 2-03-025 & A-2-MAR-03-019**, the applicant shall submit a landscaping plan for the review and approval of the Executive Director. The plan shall demonstrate that vegetation planted on the site shall not include any invasive exotic plants and shall include native vegetation that screens the proposed 10,000-gallon water tanks.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.
- C. No invasive exotic plant species shall be planted on the property that is the subject of permits No. 2-03-025 & A-2-MAR-03-019 for the life of the development authorized herein.

12. Construction Period Water Quality Protection Plan

- A. **PRIOR TO THE ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. 2-03-025 & A-2-MAR-03-019**, the applicant shall submit, for the review and approval of the Executive Director, an erosion control plan to prevent the transport of sediment from the project site. The plan shall be designed to minimize the potential sources of contaminants, pollutants, and sediment, control the amount of runoff, and retain sediment on-site during construction. The plan shall also limit application, generation, and migration of toxic substances, ensure the proper storage and disposal of toxic materials. The WQPP shall include, at a minimum, the Best Management Practices ("BMPs") specified below:

- 1. Debris Control

1. Development shall not occur when the tide is at or above the elevation of the construction site.
  2. If construction work on pilings is to occur below the low tide line, cofferdams shall be used to keep concrete contained until it is dry and cured in order to prevent the introduction of debris into the Tomales Bay.
  3. All materials, debris and equipment shall be removed from the lagoon mudflats on a daily basis.
  4. Disposal of all excavated materials must occur outside of the Coastal Zone unless authorized under an approved coastal development permit.
  5. Tarps, netting and other, similar containment devices shall be used to capture and contain debris and construction materials.
  6. Limit the application, generation, and migration of toxic substances.
  7. Properly store and dispose of toxic materials without causing significant nutrient runoff to Tomales Bay.
2. Erosion & Sediment Source Control
- a. Sequence construction to install **sediment-capturing devices** first, followed by runoff control measures and runoff conveyances. Land clearing activities should only commence after the minimization and capture elements are in place.
  - b. Time the grading activities to avoid the rainy season (October 15 through April 30).
  - c. Within five days of clearing or inactivity in construction, stabilize bare soils through either non-vegetative BMPs such as mulching or vegetative erosion control methods such as seeding. Vegetative erosion control shall be established within two weeks of seeding/planting.
  - d. Construction entrances should be stabilized immediately after grading and frequently maintained to prevent erosion and control dust.
  - e. Cover excavated material with plastic during storm events to reduce the potential of erosion.
  - f. Place stockpiled soil and/or other construction-related material away from any drainages. These stockpiles shall be contained to prevent runoff. Stockpiled soils shall be covered with tarps at all times of the year.
  - g. If sprinkling is used for dust control, application monitoring is required to prevent runoff.
3. Runoff Control and Conveyance
- a. Intercept runoff above disturbed slopes and convey it to a permanent channel or stormdrains by using earth dikes, perimeter dikes or swales, or diversions.
4. Sediment-Capturing Devices
- a. Install sediment traps/basins at outlets of diversions, channels, slope drains, or other runoff conveyances that discharge sediment-laden water. Sediment traps/basins shall be cleaned out when 50% full (by volume).

- b. Use silt fencing to trap sediment contained in sheet flow. The maximum drainage area to the fence should be 0.5 acre or less per 100 feet of fence. Silt fences should be inspected regularly and sediment removed when it reaches 1/3 the fence height. Silt fences, however, shall not be used alone as the only sediment-capturing device. A second line of defense using, for example, fiber rolls shall be installed to ensure sediment containment on-site.

5. Chemical Control

- a. Store, handle, apply, and dispose of pesticides, petroleum products, and other construction materials properly.
  - b. Maintain and wash equipment and machinery in confined areas specifically designed to control runoff. Restriction of washing and cleaning of equipment and construction vehicles within 100 feet of the Tomales Bay and unnamed blueline stream.
  - c. Provide adequate disposal facilities for solid waste produced during construction.
- B. The permittee shall be fully responsible for advising construction personnel of the requirements of the approved Erosion Control Plan.
- C. The permittee shall undertake development in accordance with the approved Erosion Control Plan. No proposed changes to the approved Erosion Control Plan shall occur without a Commission amendment to coastal development permits 2-03-025 & A-2-MAR-03-019 unless the Executive Director determines that no amendment is legally required.

13. Post Construction Storm Water Pollution Prevention Plan

- A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT NO. 2-03-025 & A-2-MAR-03-019**, the applicant shall submit, for the review and approval of the Executive Director, a Post-Construction Pollution Prevention Plan showing final drainage and runoff control measures. The plan shall be prepared by a licensed engineer and shall incorporate structural and non-structural Best Management Practices (BMPs) designed to control the volume, velocity and pollutant load of storm water leaving the developed site after completion of construction. The runoff control plan shall demonstrate that runoff from the project shall be prevented from entering Tomales Bay or the unnamed blueline stream. The Post-Construction Polluted Runoff Prevention Plan shall, include at minimum, the BMPs specified below:
- a. Runoff from the portion of the proposed parking lot and parking access paved with asphalt shall be discharged to vegetated swales or filtering strips where appropriate, or otherwise captured and treated prior to discharge to HWY 1 or adjacent surface water bodies.
  - b. Rooftop runoff from cottages C6, C7, and C8 shall be discharged to adjacent vegetated swales or filtering strips prior to reaching any stormdrains or surface water bodies.

- c. The private access road and associated parking area for cottages C1 to C5 shall remain unpaved or paved with permeable pavement.
  - d. The dumpster area to be used by the restaurant shall be covered overhead, in addition to having the curbs as proposed.
- B.** The permittee shall undertake development in accordance with the approved plan. Any proposed changes to the approved plan shall be reported to the Executive Director. No changes to the approved plan shall occur without a Commission amendment to coastal development permits 2-03-025 & A-2-MAR-03-019 unless the Executive Director determines that no amendment is required.

## **4.0 FINDINGS AND DECLARATIONS**

The findings contained in the substantial issue portion of the staff recommendation are hereby incorporated by reference.

### **4.1 Standard of Review**

For the de novo review of the portion of the project located in the County's permit jurisdiction, the standard of review is the policies of the County's certified LCP. For the portion of the project located in the Commission's original permit jurisdiction, the standard of review is the policies of Chapter 3 of the Coastal Act.

### **4.2 Background**

See discussion in Part 1, Section 2.0 above for a detailed account of events leading to the Commission's de novo consideration of the portion of the proposed project located in the County's coastal development permit jurisdiction and the coastal development permit for the portion of the proposed project located in the Commission's original permit jurisdiction.

### **4.3 Project Location, Site Description, & Project Site History**

Part 1, Sections 2.6 and 2.7 of the Substantial Issue portion of this report regarding the project location, site description, and project site history are hereby incorporated by reference.

### **4.4 Project Description**

The project consists of both new development and repair and maintenance activities that would result in the restoration and continued operation of Nick's Cove restaurant and the provision of overnight accommodations and related facilities that would be associated with the restaurant. The development being proposed under CDP 2-03-025 and A-2-MAR-03-019 is located on three separate parcels and falls within both the County's jurisdiction and the Coastal Commission's original permit jurisdiction (Exhibit 7, Project Plans & Cross-sections). Below is a description of the proposed development under CDP 2-03-025 divided by parcel. The Project Description for A-2-MAR-03-019 is located in Part 1, Section 2.8 and is hereby incorporated by reference.

The development proposed under CDP application 2-03-025 on Parcel 1 includes:

- Restoration of five cottages (totaling 2860 square feet) to provide 5 overnight guest units, which includes repair and replacement of 16 creosote and pressure-treated wood pilings



with concrete or steel pilings, and construction of new cantilevered decks (totaling 576 square feet) to replace the previously removed deteriorated decks on the rear of cottages;

- Remodeling/repair of the existing 2992 square-foot restaurant to seat 84 persons and repair of the existing 1262 square-foot deck at the rear of the restaurant to seat 46 persons with the addition of a retractable awning over the deck, which includes repair and replacement of 28 creosote and pressure-treated wood pilings with concrete or steel pilings;
- Repair of the existing (approximately 385 foot long by 6.5 feet wide) pier and 450 square-foot dock over Tomales Bay, which includes repair/replacement of 18 creosote and pressure-treated wood pilings with concrete or steel pilings;
- Reconstruction of a 242 square-foot fishing shelter at the end of the pier to replace a fishing shelter not destroyed by disaster with an offer of public access and use by the public during operating hours of the restaurant;
- Construction of four boat slips and one mooring area at the end of the existing pier for visiting boaters;
- Repair of the existing concrete and wooden bulkhead located between Highway 1 and the existing shoreline development;
- Repair of boardwalks for pedestrian access along the front of the restaurant and cottages;
- Development of five on-site parking spaces, including one for people with disabilities and a vehicle turnaround;
- Construction of new underground transmission lines for carrying water to the restaurant and cottages, and underground utility lines; and
- Construction of: (a) three grease interceptor tanks (1500 gallon capacity each) for the restaurant; (b) four 1500 gallon sewage holding tanks for the restaurant and 5 bayside cottages with all facilities traffic rated and refinery manhole covers; (c) underground pressure line for carrying effluent off-site; (d) underground water lines; and (e) underground utility lines.

The portion of development proposed on Parcel 2 also included in CDP application 2-03-025 consists of:

- Conversion of a one-story residence, totaling 1290 square feet, into two overnight guest units with the addition of decks;
- Redevelopment of one vacant two-story, 1284 square-foot structure previously used as a residence, into two overnight guest units and one residence for an employee of the facility;
- Reconstruction of an accessory structure approximately 90 square feet;
- Construction of decomposed granite pedestrian walkways, drainage grading, and landscaping improvements;
- Wetland and creek restoration activities.

The restoration of the existing structures would retain their exterior appearance. Proposed exterior colors and materials would be similar to those existing.

#### **4.5 Permit Authority, Extraordinary Methods of Repair and Maintenance**

Part of the proposed project listed in detail in Section 4.4 constitutes repair and maintenance of existing development that does not involve an addition to or enlargement of the structures that would be repaired. The proposed repair and maintenance activities include the following: (1) repair of wooden pilings supporting cottages, pier, dock, restaurant and restaurant decking; (2) repair of planking on pier, dock, pedestrian boardwalk, and restaurant deck; (3) repair of concrete and wooden bulkhead; and (4) repair of water transmission lines. Although certain types of repair projects are exempt from CDP requirements, Section 30610 of the Coastal Act and Section 13252 of the regulations requires a coastal development permit for extraordinary methods of repair and maintenance enumerated in the regulation. The proposed development involves repair to structures that would involve the placement of construction materials and removal and placement of solid materials within 20 feet of coastal waters. The proposed repair project therefore requires a coastal development permit under Section 30610 of the Coastal Act and Section 13252(a)(1) of the Commission regulations.

In considering a permit application for a repair or maintenance project pursuant to the above-cited authority, the Commission reviews whether the proposed *method* of repair or maintenance is consistent with the Chapter 3 policies of the Coastal Act. The Commission's evaluation of such repair and maintenance projects does not extend to an evaluation of the conformity with the Coastal Act of the underlying existing development.

#### **4.6 Agricultural Resources**

##### ***LCP and Coastal Act Policies***

LCP Implementation Plan Section 22.57.030 states in relevant part:

*22.57.031 Purpose. The purpose of the agricultural production zone is to preserve lands within the zone for agricultural use. The principal use of lands in the C-APZ districts shall be agricultural. Development shall be accessory, incidental, or in support of agricultural land uses, and shall conform to the policies and standards as set forth in this chapter.*

*22.57.032 Principal Permitted Uses. The following uses are permitted in all C-APZ districts subject to an approved master plan:*

- 1. Agricultural Uses. For the purposes of the coastal agricultural production zone, agricultural uses are defined as uses of land to grow and/or produce agricultural commodities for commercial purposes, including:*
  - a. Livestock and poultry: cattle, sheep, poultry, goats, rabbits, horses unless they are the primary animals raised;*
  - b. Livestock and poultry products: milk, wool, eggs;*
  - c. Field, fruit, nut and vegetable crops: hay, grain, silage, pasture, fruits, nuts and vegetables;*
  - d. Nursery products: nursery crops, cut plants.*
- 2. One single-family dwelling per parcel. Parcel is defined as all contiguous assessor's parcels under common ownership (unless legally divided as per Title 20, Marin County Code).*
- 3. Accessory structures or uses appurtenant and necessary to the operation of agricultural uses, other than dwelling units of any kind; but, including barns, fences, stables, corrals, coops and pens, and utility facilities.*

4. *Bed and breakfast operations as defined in Section 22.02.103, for such operations which offer or provide not more than three guest rooms.*

22.57.033 Conditional Uses. The following uses are permitted in all coastal agricultural production zone districts, subject to the securing of a use permit in each case. When it is determined by the planning director that any of the following uses constitute a major land use change, a master plan submitted in accordance with Chapter 22.45 may be required.

1. *Farmworker housing;*
  2. *Mobile homes which are used exclusively for employees of the owner who are actively and directly engaged in the agricultural use of the land;*
  3. *Hog ranch;*
  4. *Veterinary facilities;*
  5. *Fish hatcheries and rearing ponds;*
  6. *Stabling of more than five horses on ranches where horses are the primary or only animals raised;*
  7. *Raising of other food and fiber producing animals not listed under subsection (1) of Section 22.57.032;*
  8. *Planting, raising or harvesting of trees for timber, fuel or Christmas tree production;*
  9. *Facilities for processing or retail sale of agricultural products;*
  10. *Greenhouses;*
  11. *Commercial storage and sale of garden supply products;*
  12. *Water conservation dams and ponds;*
  13. *Mineral resource production;*
  14. *Game or nature preserve or refuge;*
  15. Public or private recreational activities, such as hunting, fishing and camping;
  16. *Bed and breakfast operations as defined in Section 22.02.103, which provide four but not more than five guest rooms;*
  17. *Construction or alteration of gas, electric, water, communication or flood control facilities, unrelated to an agricultural use, as approved by the appropriate governmental agencies;*
  18. *Dump.*
- [Emphasis added.]*

### **Discussion**

As proposed, the development includes the following development on C-APZ-60 zoned land: (1) the construction of a new sewage disposal system with leach fields, 3000 gallon siphon chamber and shallow pressurize trenches to serve the offsite existing operation of Nick's Cove; (2) the construction of a new 38 gallon per minute well to serve the operation of Nick's Cove, as well as the agricultural property (Parcel 3); and (3) the construction of appurtenant underground sewage and water pipelines to connect the sewage disposal system and the well with the Nick's Cove site.

Zoning Code Section 22.56.030 enumerates the types of principally permitted and conditional uses allowed within the C-APZ zoning district as listed above. Conditional Use 15 allows for public or private recreational activities, such as hunting, fishing, and camping and Conditional

Use 16 allows for bed and breakfast operations. As proposed, the construction of a sewage disposal system and well on the agricultural parcel would allow for the continued use of Nick's Cove, which includes a public recreational pier, dock, boat mooring, and boat slips. In addition, Conditional Use 16 allows for bed-and-breakfast operations in existing structures. The installation of a sewage disposal system and well on the agricultural property would support guest units that would be located within the existing structures on the Nick's Cove site.

Although the proposed sewage disposal system and well would encompass approximately 3 acres (1%) of the 280-acre agricultural parcel, development of the sewage disposal system would only result in the limitation of agricultural activities on one acre of the 280-acre agricultural property. Of the three acres that would be used for the proposed development, one acre would need to be fenced to preclude cattle from grazing on the leach fields. However, this one-acre area would remain available for production of hay for the ongoing cattle operation. Therefore, the proposed leach field would not significantly interfere with continued agricultural use of the 280-acre Parcel 3.

In addition, the terms of the lease require the applicant to provide a water system for the agricultural property, increasing water for the current livestock grazing agricultural operation. This improvement to the irrigation system supporting agricultural activities on Parcel 3 is sufficient mitigation to offset the minor impacts that would result from the removal of one acre from the 280 acres of grazing lands available on Parcel 3, especially given that this one-acre would remain available for production of hay.

In addition, the use of agricultural lands to construct a sewage disposal system to serve an existing priority visitor serving use, would result in the abandonment of on-site sewage disposal systems immediately adjacent to Tomales Bay. According to the Marin County LCP, the widespread use of septic systems along the shorelines and within the watershed of Tomales Bay contributes to water quality problems in the Bay. Septic systems, holding tanks, or other means provides sewage disposal for all shoreline lots. In general, due to the age of existing systems, the physical characteristics of shoreline lots, and the lack of a septic tank maintenance agency, the condition of most existing systems is very marginal. Most lots cannot support on-site sewage disposal in a manner consistent with the County's septic system standards and the standards of the Regional Water Quality Control Board. In some instances, raw sewage may be discharged directly into Tomales Bay.

At present, Nick's Cove is served by a variety of sewage disposal facilities, which include sewage tanks, cesspools, and disposal trenches. In 1992, the former owner had to repair the sewage disposal facilities located on the bayside parcel (Parcel 1) because of sewage being discharged into the Bay. Since that time, the restaurant has been served by the repaired system; however, the bayside cottages have had no sewage disposal provisions because of the constraints and limitations of the bayside property to provided sewage disposal compliance with County standards. By constructing a new sewage disposal system, which would be designed to serve the existing restaurant, bayside cottages, and inland cottages, all existing on-site sewage disposal facilities would be abandoned and removed. The new sewage disposal system would be located approximately 300 feet above the high tide of Tomales Bay and on the east side of Highway 1. Placing the sewage disposal system for the existing structures offsite would increase the protection of water quality of Tomales Bay by eliminating any potential for sewage discharged into the Bay waters as all the sewage from existing structures would be disposed of onto the Parcel 3. Furthermore, the applicant proposes to abandoned and remove all existing sewage

tanks, cesspools, and disposal trenches. Use of the agricultural property for the sewage disposal system would therefore correct significant adverse impacts to coastal water quality and human health from the on-site sewage disposal systems.

As discussed above, the proposed development would: (1) result in insignificant impacts to agricultural resources; (2) benefit the water quality of Tomales Bay and human health; and (3) allow for the continued operation of a priority visitor serving use. However, to ensure that the proposed improvements (sewage disposal system and well) would not be used to support new or expanded nonagricultural development, **Special Condition 1** prohibits the use of any water that would be obtained from the proposed well for uses other than: (1) the existing visitor serving operation of Nick's Cove consisting of a restaurant, 11 overnight guest units, and one employee unit; and (2) agricultural activities. **Special Condition 2** also limits the use of the sewage disposal system to: (1) the existing visitor serving operation of Nick's Cove; and (2) four residential structures located at 23065, 23075, 23085, and 23099 Highway 1 if such existing structures cannot comply with County and/or State health codes or water quality standards. **Special Condition 2** also specifies that the sewage disposal system shall not be used to support any new or expanded development other than the development specifically proposed under this permit application. Use of the sewage disposal system may only be used to support the current configuration of the existing four residential developments.

Therefore, as conditioned, the sewage disposal system and well proposed on the adjacent agricultural parcel would (1) result in insignificant impacts to agricultural resources; (2) benefit the water quality of Tomales Bay and human health; and (3) would allow for the continued operation of a priority visitor serving use and would not allow for the expansion of or development of new nonagricultural development. Thus, the Commission finds the proposed development as conditioned is in conformance with LCP Zoning Code Section 22.57.030.

#### **4.7 Geologic Stability/Hazards**

##### **Coastal Act Policies**

Section 30253 states in relevant part:

*New development shall:*

*Minimize risks to life and property in areas of high geologic, flood, and fire hazard. Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural the landforms along bluffs and cliffs.*

##### **Discussion**

The project site is located approximately 4000 feet (3/4 mile) east of the main trace of the San Andreas fault zone and may, over the course of its economic life, be subject to significant seismic activity, including intense ground shaking, liquefaction, or ground rupture. Portions of the development are also located on pilings within Tomales Bay and may be subject to heavy surf and wave conditions during storms. Given the proximity of the site to the San Andreas fault zone, the Commission finds that the subject lot is an inherently hazardous piece of property. Coastal Act Section 30253 requires that development minimize risks to life and property in areas of high geologic, flood and fire hazard. Failure to design or perform the proposed repairs

sufficiently to withstand these conditions could result in failure of either structure and/or injury to persons or damage to property.

In order to minimize the development's risk to life and property in an area of high geologic hazard consistent with Section 30253 of the Coastal Act, the Commission imposes **Special Condition 3**, which requires that the applicant submit, for the review and approval of the Executive Director, prior to the issuance of the permit, a geotechnical report for the proposed development. The geotechnical report shall evidence that it has been prepared in conformance with all of the following: (1) all of the requirements found in the "Guidelines for Engineering Geology Reports" set forth by the State Board for Geologists and Geophysicists; (2) the "Geologic Guidelines for Earthquake and/or Fault Hazard Reports" set forth by the State Board for Geologists and Geophysicists; (3) a liquefaction analysis (performed according to the "Recommended Procedures for Implementation of DMG Special Publication 117 Guidelines For Analyzing and Mitigating Liquefaction Hazards in California, March 1999"); and (4) seismic design criteria identified by International Building Code. **Special Condition 3** also requires that the final design and construction plans, including foundations, grading and drainage plans conform to the geotechnical consultant's recommendations. **Special Condition 3** further requires that if the geotechnical report finds evidence of: 1) a fault trace with Holocene movement; 2) a factor of safety against liquefaction-induced settlement, surface manifestation of liquefaction, or lateral spread of less than 1.3; or 3) a factor of safety against surficial or deep-seated slope failure of less than 1.5 (static) or 1.2 (pseudostatic, assuming a seismic coefficient of 0.15 g); or estimated seismic displacement of more than 50 cm, the applicant shall within 30 days of such determination submit an application to the Commission for a coastal development permit amendment to address such finds.

Since the applicant proposes development on a site subject to seismic, wave, storm surge, tsunami, and flooding hazards, the Commission imposes **Special Condition 4**, which requires the landowner to assume the risks of any losses associated with the proposed development due to flood, seismic, geologic, and geotechnical hazards of the property, waive any claim of liability on the part of the Commission for such losses, and indemnify the Commission in the event that third parties bring an action against the Commission as a result of the failure of the development to withstand hazards. The Commission finds that **Special Condition 4** is required because the applicant has voluntarily chosen to implement the project despite the risk of hazards.

In addition, **Special Condition 5** requires that a deed restriction be recorded informing future buyers of the property of the special conditions of the permit, including the required conformance of all plans to the geotechnical recommendations and the requirement that the landowner assume the risk and indemnify the Commission from all liability associated with the approved development. Recordation of such a deed restriction will provide notice to future buyers/owners of potential hazards of the property and eliminate false expectations of potential buyers of the property, lending institutions, and insurance agencies that the property is safe for an indefinite period of time and for further development indefinitely into the future. In addition, the condition ensures that future owners will be informed of the Commission's immunity from liability and the indemnity afforded the Commission. Therefore, as conditioned, the proposed development minimizes risks to life and property in areas of high geologic, flood, and fire hazard and is consistent with Section 30253 of the Coastal Act.

## 4.8 Public Access and Public Recreation

### **LCP and Coastal Act Policies**

Coastal Act Section 30210 states:

*In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Coastal Act Section 30211 states:

*Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

LUP Public Access Policy 3(b)(2) states in relevant part:

*3. Specific recommendations for new accessways in Unit II. The recommendations for new accessways have been divided into three geographic areas: west shore of Tomales Bay, east shore of Tomales Bay, and the area north of Walker Creek. If and when undeveloped parcels on the shoreline of Tomales Bay are purchased by the federal government, access easements by the County on those parcels will no longer be necessary.*

*...*

*b. East shore of Tomales Bay. Recommendations for the east shore are listed from north to south in seven segments.*

*...*

*(2) Location: Miller Park to North Shore Boats. The*

*Description: This relatively narrow section of shoreline has a variety of visitor-serving, residential, nature preserve, and marine-related uses.*

*Development is concentrated at the northern end near Nick's Cove and at the southern end near North Shore Boats, with a few single-family dwellings scattered in between. Nick's Cove and Miller Park form a popular recreational area used by the public for clamming, boating, and fishing. In addition to public access at this point, limited access is available at North Shore Boats, a boat storage, launching, and repair facility. The undeveloped parcels along the entire shoreline in this area, including that owned by Audubon Canyon Ranch, show evidence of public use for access and parking.*

**LCP recommendations:** *Vertical and lateral access to tidelands shall be maintained in the vicinity of Nick's Cove. The developed parcels, AP #104-150-01 and 02 which constitute the Cove, shall incorporate formal provisions for public access if they are further developed...*

### ***Discussion***

In its application of the access policies of the Coastal Act, the Commission is limited by the need to show that any denial of a permit application based on these sections, or any decision to grant a permit subject to special conditions requiring public access, is necessary to offset a project's adverse impact on existing or potential public access. In addition, LUP Public Access Policy 3(b)(2), while not the standard of review on Parcel 1 (the parcel between the first public road in the sea), offers guidance to the Commission. LUP Public Access Policy 3(b)(2) states that Nick's Cove is a popular recreational area used by the public for clamming, boating, and fishing. The policy also recommends that further development of Nick's Cove incorporate formal provisions for public access.

Parcel 1, located at 23240 Highway 1, which runs along the east side of Tomales Bay, lies between Highway 1 and Tomales Bay. The applicant privately owns the parcel and there are no recorded public access easements or offers to dedicate public access easements affecting the subject parcel. However, because a portion of the land is located on tidelands and filled former tidelands, a public trust easement may extend over some of the site. This easement guarantees the public's right to access the shoreline for the purposes of navigation, commerce, fishing and recreation. In addition, neither the applicant nor the Commission staff have conducted a study to determine whether the public may have a right to access the coast through any portion of the privately owned project site based on use; however, the LCP states that Nick's Cove, as well as other private lands adjacent to Highway 1 and in the vicinity, are fully visible to the public and thus receive regular public use and visitation. Thus, there is a potential that the public may also have acquired a right by implied dedication to use the project site to access the coast and the sea.

Section 30211 of the Coastal Act states, in part, that "development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization." When evaluating the conformance of a project with 30211, the Commission or the applicable local government cannot determine whether public prescriptive rights actually do exist; rather, that determination is made by a court of law. However, the Commission or the applicable local government is required under Section 30211 to prevent development from interfering with the public's right of access to the sea where acquired through use or legislative authorization. As a result, where there is substantial evidence that such rights may exist, the Commission or the applicable local government must ensure that proposed development would not interfere with any prescriptive rights which may exist.

Accordingly, the Commission must here consider whether the proposed development will interfere with or adversely affect an area over which the public has obtained rights of access to the sea. Where there is substantial evidence of the existence of a public access right acquired through use, and a proposed development would interfere with that right, the Commission may deny a permit application under Public Resources Code Section 30211. As an alternative to denial, however, the Commission may condition its approval on the development being modified or relocated to preclude the interference or adverse effect. This is because the Commission has no power to extinguish public rights, even though it may authorize development which affects the exercise of those rights. The Commission need not determine whether there is substantial evidence to support the conclusion that the area has been impliedly dedicated to public use, however, if the Commission finds the proposed development will not interfere with any such impliedly dedicated public use.



In the present case, the applicant has proposed public access as part of the project. The applicant elected to grant such access to eliminate the potential that proposed development would interfere with any public access rights which may exist. Consequently, the Commission will evaluate whether the project as proposed would interfere with potential prescriptive rights of public access that might exist on the property. If the proposed project would not interfere with any potential prescriptive rights of public access that might exist, the project would be consistent with Section 30211 of the Coastal Act and the certified LCP because any public rights of access to the sea acquired through use would be protected. Therefore, if the Commission determines that the proposed development would not interfere with potential prescriptive rights of public access that might exist on the property, the Commission need not do an exhaustive evaluation to determine if substantial evidence of an implied dedication exists because regardless of the outcome of the investigation, the Commission could find the project consistent with Section 30211.

As proposed, the project includes the construction of a fishing shelter, a boat mooring, and four boat slips. To the extent that such development would be intended for private use, it would interfere with the public's right to access the shoreline for the purposes of navigation, commerce, fishing and recreation. However, the applicant has offered to dedicate a vertical public access easement over the facilities, which includes public access to the pier, dock, fishing shelter, boat mooring and boat slips during restaurant hours as outlined in the Marin County Resolution No.2003-46. This offer to dedicate a vertical public access easement would ensure that the public would be able to obtain access from Highway 1 along the pier to the shoreline. The restaurant hours of operation vary as follows:

	Peak season (app. May 15- Sep 30)	Off-season (app Oct. 1- May 14)
Breakfast	As needed	As needed
Lunch	11:30 a.m.-5 p.m.	11:30 a.m. -5 p.m.
Sunday-Saturday dinner	5 p.m.-10 p.m.	5 p.m.-8 p.m.
Sunday-Saturday bar	11:30 a.m.-11 p.m.	11:30 a.m.-9 p.m.

In addition, the applicant has indicated his willingness to execute and record a lateral public access easement along the portion of the parcel seaward of the bulkhead, or the MHTL where there is no bulkhead, excluding the footprint of the interior of the restaurant and the cottages but including the exterior deck of the restaurant.

A full assessment of the degree to which the criteria for implied dedication has been met in this case could only be made after a more intensive investigation of the issue has been performed. A survey of potential users of the site would provide helpful information to augment the information regarding use of the shoreline area at the project site. However, as noted previously, the Commission need not determine whether there is substantial evidence to support the

conclusion that the area has been impliedly dedicated to public use if the Commission finds the proposed development will not interfere with any such impliedly dedicated public use.

Here, although there is an unresolved question as to the existence of public prescriptive rights at the site, the applicant's offer to dedicate easements for lateral and vertical shoreline access would serve to protect any existing public access rights that would be blocked by the proposed development. The public access easements to be provided on the subject property provide equivalent public access as the portion of the site where prescriptive rights of access may exist because (a) the project would provide lateral and vertical access to and along the shoreline and (b) the project would provide access for fisherman to access the bay.

Thus, the Commission finds that the applicant's proposal to dedicate easements for public access to and along the shoreline are equivalent in time, place, and manner to that portion of the project site where prescriptive rights may exist. Therefore, the Commission need not perform an exhaustive evaluation to determine if substantial evidence of an implied dedication exists because, regardless of the outcome of the investigation, the Commission could find the project as conditioned protects the rights of the public consistent with Section 30211 of the Coastal Act.

While the applicant's proposal would support public access, it does not ensure continued and regular access since the proposed hours of the vertical access easement would be tied to the restaurant's hours of operation, which vary greatly depending on whether it is the weekend or a weekday or high season or low season.

Therefore, in order to ensure that the proposed development would not interfere with the public's right to access the shoreline and waters of Tomales Bay, **Special Condition 6** requires that the final project plans provide for a continuous public accessway reserved for exclusive public access use free of charge to the pier, dock, fishing shelter, boat mooring, and four boat slips. **Special Condition 6** further requires that the accessways: (1) include a permanent sign, minimum size of 12 in. by 18 in., which prominently conveys the exclusive ability of the accessway for public use free of charge and the hours which it shall be open for public use; (2) be available for exclusive public use daily (7 days a week) free of charge during daylight hours (i.e. from sunrise to sunset times as routinely published in newspapers and on tide tables) and after sunset when the restaurant is still open for business; (3) be designed to meet the Americans with Disabilities Act (ADA) accessibility guidelines for wheelchair access; and (4) not be gated, chained, or otherwise closed off during the time period when it is required to be available for public use free of charge. **Special Condition 6** also requires that commercial uses be limited to the 200 square feet of the fishing shelter. Consistent with the applicant's proposal, **Special Condition 7** requires the landowner to, consistent with the terms of its proposed project description, record a vertical public access easement over the pier, dock, fishing shelter, boat mooring, and boat slips, which shall reflect the above referenced access requirements. These requirements assure that the pier, dock, fishing shelter, boat mooring, and boat slips would actually be reserved and used for public access purposes by ensuring that they would be: (a) available for exclusive public use free of charge on a daily basis, (b) large enough to allow for unobstructed pedestrian and wheelchair access, and (c) sufficiently identified to encourage their use. **Special Condition 7** also requires the landowner to execute and record a lateral public access easement along the portion of the parcel seaward of the bulkhead, or the MHTL where

there is no bulkhead, excluding the footprint of the interior of the restaurant and the cottages but including the exterior deck of the restaurant.

In addition to the development discussed above, the applicant proposes to construct 576 square feet of decking on the bayside of the five cottages. The cottages originally had decks on the bayside; however, no decks remain on the cottages at this time. The proposed decks would be located on a sandy beach seaward of the mean high tide line and would interfere with the public's right to access the shoreline and the sea. Thus, as proposed, the decks would conflict with Section 30211. Therefore, **Special Condition 8** requires the applicant to submit revised plans which eliminate the proposed bayside decking on Cottages 1, 2, 3, 4, and 5.

The project also includes various repair and maintenance activities consisting of repair to: (1) the restaurant and pier decking; (2) pilings associated with the pier, dock, restaurant, and cottages; and (3) bulkhead. The various methods of repair proposed for the restaurant, pier, dock, and cottages would not interfere with any public access rights that may exist on the site. In fact, the repairs would enhance access to the shoreline by making the pier and dock safe and accessible to the public. However, the applicant also proposes to repair a bulkhead made of concrete and wood, which is located underneath the front of the restaurant structure and extends along the beachfront between the restaurant and cottages and under Cottages 1, 2, and 3. The applicant submitted a letter from a licensed civil engineer, Terry J. O'Reilly, dated April 2, 2001, in which Mr. O'Reilly recommends that portions of the wooden parts of the bulkhead in the vicinity of the cabins be removed and replaced with a new extension. Mr. O'Reilly identifies possible materials for repairs that include concrete, masonry block, and lumber; however, no specific plan details were submitted as part of the application. If the proposed repairs resulted in further encroachment seaward of the bulkhead, the proposed repairs would be in conflict with Section 30211. Therefore, **Special Condition 9** requires that the applicant submit for the review and approval of the Executive Director, plans depicting the proposed bulkhead repair. **Special Condition 9** also prohibits any seaward encroachment that could result from the proposed bulkhead repairs.

Therefore, as conditioned to protect public access, the Commission finds that the proposed project is consistent with Sections 30210 and 30211 of the Coastal Act.

## 4.9 Wetlands

### **LCP and Coastal Act Policies**

Coastal Act Section 30233 states in relevant part:

*(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*

*(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*

*(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*

*(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.*

*(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*

*(5) Incidental public service purposes, including but not limited to thereafter, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*

*(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*

*(7) Restoration purposes.*

*(8) Nature study, aquaculture, or similar resource dependent activities.*

LUP Natural Resources Policy 4 states in relevant part:

*a. Diking, filling, and dredging of wetlands shall be permitted only in conformance with the policies contained in the LCP on this subject, presented on page 136. In conformance with these policies, filling of wetlands for the purposes of single-family residential development shall not be permitted.*

*b. Allowable resource dependent activities in wetlands shall include fishing, recreational clamming, hiking, hunting, nature study, birdwatching and boating.*

...

*d. A buffer strip one hundred feet in width, minimum, as measured landward from the edge of the wetland, shall be established along the periphery of all wetlands. Where appropriate, the required buffer strip may be whiter based upon the findings of the supplemental report required in (e). Development activities and uses in the wetland buffer shall be limited to those specified in (a) and (b) above.*

...

Zoning Code Section 22.56.130 G (5)(d) states:

*A buffer strip one hundred feet in width, minimum, as measured landward from the edge of the wetland, shall be established along the periphery of all wetlands. Development activities and uses in the wetland buffer shall be limited to those allowed pursuant to Section 30233 of the Coastal Act of 1976.*

According to the applicant's consultant, adjacent to both sides of the unnamed stream, are wetlands totaling approximately .07 acres (Exhibit 9, Wetland Delineation Map). In addition, the consultant identified .26 acres of area on the northern side of the stream that had a predominance of wetland indicator species among the dominant plants; however, the consultant concluded that this area is not a wetland. This conclusion was based on the following factors:

1. Prior to April 2001, the terrace was probably predominantly upland vegetation consisting of coyote bush scrub with an admixture of Himalayan blackberry. This was based on examining brush piles after the area was scraped, apparently with a bulldozer.
2. By April 30, 2001 following the scraping, the terrace had been colonized by both upland and wetland indicator species, but the former were predominant and the area was mapped as ruderal.
3. There do not appear to be significant differences in soil or topography between the areas on the terrace that are currently dominated by upland plants and areas that are currently dominated by wetland indicator plants.
4. Several of the wetland indicator species present are also found frequently in uplands.
5. There are no standard indicators of wetland hydrology or of hydric soils.
6. The presence of scattered small coyote bushes is interpreted as evidence that the area is in a successional state and will over the next few years revert to coyote bush scrub.

Section 30121 of the Coastal Act defines "wetland" as follows:

*"Wetland" means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.*

Commission Regulation Section 13577(b) further defines wetland as follows:

*... land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats.*

Various state and federal agencies are charged with regulating the use of wetlands within the Coastal Zone, including the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the California Department of Fish and Game, the California Coastal Commission, and local

jurisdictions with a certified LCP, among others. While each of these agencies regulates wetlands under a different statutory authority, they all define “wetland” based on three basic parameters: hydrology, soil type, and vegetation. The differences in how these agencies determine whether a particular area qualifies as a wetland lie in the way that these three parameters are treated. Generally speaking, the Corps uses the narrowest definition, requiring evidence of each of the three-wetland parameters. USFWS, CDFG, the Commission and local governments with a certified LCP generally accept evidence of positive field indicators of less than three parameters to demonstrate that an area is a wetland, i.e. areas wet long enough to bring about the formation of hydric soils or to support the growth of wetland plants.

In the opinion of Commission staff biologist, Dr. John Dixon, at Nick’s Cove, the applicant's position that the terrace area was coyote bush scrub prior to being scraped raises a legitimate question as to the site’s current status, but is not itself evidence that the site currently has upland characteristics. Each sample plot showed a preponderance of wetland indicator species (Exhibit 10, Memo from Dr. Dixon (Table 2)). Under the Coastal Act definition of wetlands, this is presumptive evidence of wetland conditions. No strong positive evidence of upland conditions has been presented that would rebut the presumption that the existing wetland indicator species are growing as hydrophytes. Therefore, it is the professional opinion of Dr. Dixon that this patch of vegetation is a wetland under the definitions contained in the Coastal Act and Section 13577 of the Commission’s regulations (Exhibit 10, Memo from Dr. Dixon). Thus, the total amount of wetlands on the Nick's Cove project site total .33 acre (Exhibit 9, Wetland Delineation Map)

Section 30233 prohibits wetland fill, unless it is for one of the eight enumerated purposes listed above. As proposed the project includes the installation of a pedestrian bridge, pedestrian pathways, and seating area within the wetland, which would result in wetland fill, in conflict with Section 30233. Therefore, **Special Condition 10** requires the applicant to submit revised plans, which either: (1) relocate such proposed development outside of the wetlands and the wetlands buffer as generally depicted on Exhibit 9 or (2) eliminate the proposed pedestrian bridge, pathways, and seating area from the proposed project.

As proposed, in addition to development within the wetland, the project involves various development activities within 100 feet of the wetland, which include the construction of granite pedestrian pathways, a terraced garden, the relocation and reconstruction of four ancillary structures, construction of a portion of the driveway, and the construction of an entry staircase on Cottage 6 and an entry deck on Cottage 7. The Coastal Act does not specify a specific wetland buffer; however, Coastal Act Section 30240(b) requires that proposed development be sited and designed to avoid significant impacts to adjacent environmentally sensitive habitat areas (ESHA). In accordance with Coastal Act Section 30240(b), the Commission generally requires a 100-foot buffer. Furthermore, LUP Natural Resources Policy 4(d) and Zoning Code Section 22.56.130 G (5)(d) require a minimum 100 foot buffer from the periphery of all wetlands and limits development activities and uses within 100 feet of a wetland to those specified in 4(a) and 4(b), and Coastal Act Section 30233.

The proposed staircase and entry deck are minor improvements to existing development, which have been sited at the location farthest from the wetland on both structures and would minimize disturbance to the area. However, the proposed pedestrian pathways, terraced garden, driveway

construction and the four ancillary structures proposed for relocation and reconstruction, constitute new development located within 100 feet of the wetland, inconsistent with Coastal Act Section 30240(b), LUP Natural Resources Policy 4(d), and Zoning Code Section 22.56.130 G (5)(d). Therefore, **Special Condition 8** requires the applicant to submit revised plans, which either: (1) relocate such proposed development outside of the wetlands and the wetlands buffer as generally depicted on Exhibit 9 or (2) eliminate the proposed new development described above located within 100 feet of the wetland.

Therefore, as condition to remove all new development located within 100 feet of the wetland, the Commission finds that the proposed development is consistent with Coastal Act Sections 30233 and 30240(b), LUP Natural Resources Policy 4(d), and Zoning Code Section 22.56.130 G (5)(d).

#### **4.10 Environmentally Sensitive Habitats and Water Quality**

##### **LCP and Coastal Act Policies**

Coastal Act Section 30240 states:

*(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*

*(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

Coastal Act Section 30107.5 states:

*"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

LUP Policy 5(b) states:

*Other sensitive habitats include habits of rare or endangered species and unique plant communities. Development in such areas may only be permitted when it depends upon the resources of the habitat area. Development adjacent to such areas shall be set back a sufficient distance to minimize impacts on the habitat area. Public access to sensitive habitat areas, including the timing, intensity, and location of such access, shall be controlled to minimize disturbance to wildlife. Fences, roads, and structures which significantly inhibit wildlife movement, especially access to water shall be avoided.*

Zoning Code Section 22.56.130 I(2) states:

*Siting of New Development. Coastal project permit applications shall be accompanied by detailed site plans indicating existing and proposed construction, major vegetation, watercourses, natural features and other probable wildlife habitat areas. Development shall be sited to avoid such wildlife habitat areas and to provide buffers for such habitat*

*areas. Construction activities shall be phased to reduce impacts during breeding and nesting periods. Development that significantly interferes with wildlife movement, particularly access to water, shall not be permitted.*

Nick's Cove is near the northern limit for the range of the California red-legged, and is within a California red legged frog critical habitat watershed (USFWS, 2001). CRLF have been extirpated or nearly extirpated from over 70 percent of their former range and are federally listed as threatened. Habitat loss, competition with and direct predation by exotic species, such as bullfrogs, and fragmentation of habitat due to encroachment of development are the primary causes for the decline of this species throughout its range. The remaining populations are primarily in central coastal California and are found in aquatic areas that support substantial riparian and aquatic vegetation and lack non-native predators. Habitat for CRLF is typically deep-water pools with fringes of dense, emergent vegetation or dense shrubby vegetation, such as cattails and willows. Frogs hibernate in small mammal burrows, leaf litter, or other moist sites in or near (within a few hundred feet of) riparian areas (USFWS 1994, USFWS 1996). The CRLF critical habitat designation provides guidance on the physical and biological features that are considered essential to the conservation of the species, as cited below:

*In summary, the primary constituent elements consist of three components. At a minimum, this will include two (or more) suitable breeding locations, a permanent water source, associated uplands surrounding these water bodies up to 90 m (300 ft) from the water's edge, all within 2 km (1.25) miles of one another and connected by barrier-free dispersal habitat that is at least 90 m (300 ft) in width. When these elements are all present, all other suitable aquatic habitat within 2 km (1.25 mi.), and free of dispersal barriers, is also considered critical habitat.*

Section 30107.5 of the Coastal Act defines environmentally sensitive habitat areas (ESHA) as those in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments and LUP Natural Resources Policy 5(b) also states that sensitive habitats include habitats of rare or endangered species and unique plant communities. Suitable breeding ponds are located within 1500 feet of the project site; however, there is no suitable breeding habitat on site. Although no protocol level the CRLF survey has been done at the Nick's Cove site, and the habitat at the site itself is marginal due to the absence of riparian vegetation, the very open, disturbed, ruderal quality of adjacent upland, and since at the western end of the stream flows under Highway 1 and into Tomales Bay, neither of which are desirable destinations for CRLF, good suitable habitat does exist in the dense willow riparian thicket immediately upstream from the project site (Renshaw 2001). According to Section 30107.5, the breeding ponds and the upstream willow riparian thicket are defined as ESHA because they support CRLF, a federally listed species, and because these habitat areas could be easily disturbed or degraded by human activity and development.

In accordance with Coastal Act Section 30240(b), LUP Natural Resources Policy 5(b), and Zoning Code Section 22.56.130 I (2), the proposed development must be sited and designed to avoid significant impacts to the adjacent ESHA. CRLF are very mobile and are known to disperse and change locations. If a frog happened to enter the project site, construction activities



may cause frog mortality. Thus, to prevent CRLF from entering the project site, **Special Condition 10** requires that: (1) prior to the commencement of construction of development at the project site, the applicant shall survey the construction area on Parcel 2 for CRLF (the surveys shall be conducted by a qualified biologist in accordance with USFWS protocol (USFWS 1997)); (2) a qualified biological monitor experienced with the CRLF shall be present at the project site during all construction activities on Parcel 2 ; (3) the biological monitor shall have the authority to halt all construction activities as necessary to protect habitat and individual animals; (5) construction within these locations is prohibited at any time that a CRLF is present in the construction area; (6) if a CRLF is found within the construction area on Parcel 2, no work shall occur until the frog has moved outside of the construction area; and (7) if the CRLF will not move outside the construction area on its own, the biological monitor shall consult U.S. Fish and Wildlife service for further instructions. Thus, as conditioned to protect any CRLF that enter the project site, the Commission finds that the development conforms with Section 30240(b) of the Coastal Act, LUP Natural Resources Policy 5(b), and Zoning Code Section 22.56.130 I (2).

In addition, the proposed development includes landscaping. In sensitive habitat areas, native plants have important functions in the ecosystems, such as manufacturing oxygen and filtering impurities from water. They also provide food and shelter for native wild animals. A problem arises if non-native plants become established by out competing or smothering native plants. They can then clog waterways and deprive wild animals of native food (California Native Plant Society 2001). Thus, the use of invasive exotic plants for the proposed landscaping would be inconsistent with Coastal Act Section 30240(b), which prohibits development adjacent to ESHAs that would significantly degrade those areas. As proposed, the landscaping plan includes *Lobularia maritima*, an invasive species, inconsistent with the requirements of Section 30240(b). Therefore, **Special Condition 11** requires the applicant to submit for the review approval of the Executive Director a final landscaping plan which eliminates all non-native invasive species. **Special Condition 11** further requires that only native plants indigenous to the area and non-native noninvasive species be planted on the property that is subject of this permit for the life of the development authorized herein.

Thus, as conditioned to protect any California red-legged frogs that enter the project site and to prevent the introduction of non-native invasive plant species to the habitat, the Commission finds that the development conforms with Section 30240(b) of the Coastal Act.

#### **4.11 Water Quality**

##### ***LCP and Coastal Act Policies***

Coastal Act Section 30230 states:

*Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Coastal Act Section 30231 states:

*The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through among other means, minimizing adverse effects of waste water discharged and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waster water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

LUP New Development and Land Use Policy 6 states:

*Watershed and water quality protection/grading.* *In order to ensure the long-term preservation of water quality, protection of visual resources, and the prevention of hazards to life and prosperity, the following policies shall apply to all construction and development, including grading and major vegetation removal, which involve the movement of earth in excess of 150 cubic yards.*

- a. Development shall be designed to fit a site's topography, soils, geology, hydrology, and any other existing condition and be oriented so that grading, cut and fill operations, and other site preparation are kept to an absolute minimum. Natural features, landforms, and native vegetation shall be preserved to the maximum extent feasible. Areas of a site which are not suited to development because of known soil, geologic, flood, erosion or other hazards shall be kept in open space.*
- b. For necessary grading operations, the smallest practicable area of land shall be exposed at any one time during development and the length of exposure shall be kept to the shortest practicable time. The clearing of land shall be avoided during the winter rainy season and all measures for removing sediments and stabilizing slopes shall be in place before the beginning of the rainy season.*
- c. Sediment basins (including debris basins, desilting basins, or silt traps) shall be installed on the project site in conjunction with national grading operations and maintained through the development process to remove sediment from runoff waters. All sediment shall be retained on site unless removed to an appropriate dumping location.*
- d. Temporary vegetation, seeding, mulching, or other suitable stabilization methods shall be used to protect soils which have been exposed during grading or development. Cut and fill slopes shall be stabilized immediately with plantings of native species, appropriate non-native plants, or with accepted landscaping practices.*
- e. Where topsoil is removed by grading operation, it shall be stockpiled for reuse and shall be protected from compacting and wind erosion during stockpiling.*
- f. The extent of impervious surfaces shall be minimized to the greatest degree possible. Provisions shall be made to conduct surface water to storm drains or suitable watercourses to prevent erosion. Drainage devices shall be designed to*

*accommodate increased runoff resulting from modified soil and surface conditions as a result of development. Grassed waterways are preferred to concrete storm drains, where feasible for runoff conveyance. Water runoff beyond natural levels shall be retained on site whenever possible to facilitate groundwater recharge.*

. Section 22.56.130(C) requires the following:

Grading and excavation: *The following standards shall apply to coastal projects which involve the grading and excavation of 150 cubic yards or more of material.*

- 1) Development shall be designed to fit a site's topography and existing soil, geological, and hydrological conditions so that grading, cut and fill operations, and other site preparation are kept to an absolute minimum and natural landform are preserved. Development shall not be allowed on site, or areas of a site, which are not suited to development because of known soil, geology, flood, erosion or other hazards that exist to such a degree that corrective work, consistent with these policies (included but not limited to the protection of natural landform) is unable to eliminate hazards to the property endangered thereby.*
- 2) For necessary grading operations, the smallest practicable area of land shall be exposed at any one time during development and the length of exposure shall be kept to the shortest practicable time. The clearing of land shall be avoided during the winter rainy season and all measures for removing sediments and stabilizing slopes shall be in place before the beginning of the rainy season.*
- 3) In addition to such standards as may be imposed under MCC Chapter 23.08.090, the following standards shall be required:*
  - a) Sediment basins (including debris basins, desilting basins, or silt traps) shall be installed at the beginning of grading operations and maintained throughout the development process to remove sediment from runoff waters. Temporary vegetation, seeding, mulching, or other suitable stabilization methods shall be used to protect soils which have been exposed during grading or development. Cut and fill slopes shall be permanently stabilized as soon as possible with native plants or other suitable landscaping techniques.*
  - b) The extent of impervious surfaces shall be minimized to the greatest degree possible. Water runoff beyond natural levels shall be retained on-site whenever possible to facilitate maximum groundwater recharge. In order to prevent gullying the velocity of runoff on an off the site shall be dissipated through the application of appropriate drainage controls so that the runoff rate does not exceed the storm water runoff. Grassed or natural waterways are preferred to concrete storm drains for runoff conveyance.*
  - c) Pollutants such as chemicals, fuels, and other harmful materials shall be collected and disposed of in an approved manner.*

- d) *Where topsoil is removed by grading operations, it shall be stockpiled for subsequent re-use, where appropriate.*
- e) *All debris shall be removed from the site upon the completion of the project.*
- f) *Permit application for grading which involve cut slopes in excess of 8 feet or fill in excess of 5 feet shall include a report from a registered soils or civil engineer.*

### **Discussion**

The project site is located on and adjacent to Tomales Bay. As noted in the project description, an unnamed blueline stream bisects Parcel 2 and flows under Highway 1 through a culvert and into Tomales Bay. Tomales Bay is within the Gulf of the Farallones National Marine Sanctuary, one of four national marine sanctuaries in California and one of thirteen in the nation. The Sanctuary was designated in 1981 to protect and manage the 1,255 square miles encompassing the Gulf of the Farallones, Bodega Bay, Tomales Bay, Drakes Bay, Bolinas Bay, Estero San Antonio, Estero de Americano, Duxbury Reef, and Bolinas Lagoon. Tomales Bay provides important habitat for birds, marine mammals and over 1,000 species of invertebrates. In addition, sharks and rays spawn in the Bay. The Bay also supports a significant aquaculture industry. Protecting the water quality and biological productivity of Tomales Bay is essential to preserving the Bay and the coastal resources it supports.

Section 30230 states that marine resources, especially those areas and species of special biological significance, shall be maintained and where possible enhanced. Section 30231 protects the biological productivity and the quality of coastal waters, and wetlands. The proposed project would support the goals of Sections 30230 and 30231 because it would remove some of the existing creosote treated piles that support the restaurant, pier, and cottages. Creosote, a chemical used to prevent the deterioration of wood by wood-boring organisms, is obtained by the distillation of coal tar and is primarily made up of a mixture of chemicals called polycyclic aromatic hydrocarbons (PAHs). PAHs can potentially leach out of the pilings that and into the water column where they can be absorbed by fish and other aquatic organisms with potentially adverse consequences. The applicant proposes to replace deteriorated creosote treated piles with nontreated wood or concrete. Structurally sound creosote treated piles would not be replaced at this time.

The proposed development would result in overall improvement to water quality and biological productivity through the removal some of creosote treated wood; however, other aspects of the proposed development may affect the water quality and biological resources of Tomales Bay. Since the pier, dock, restaurant, and cottages are directly above the beach and intertidal areas, the potential exists for debris, sediment, or other materials associated with the pile removal/installation process and the repair/replacement of planking on the pier and decks to be introduced into Tomales Bay. In addition, if the applicant replaces the deteriorated pilings with concrete, during the construction process damp or wet concrete can leach into surrounding water, changing the water chemistry. Any of the building materials discussed above could significantly degrade the water quality and habitat in the project area, inconsistent with Section 30230 and

30231 of the Coastal Act. Furthermore, because of the proximity of the proposed development to the stream, any sediment or polluted runoff associated with construction equipment and the construction process that occurs on the site may adversely impact the biological productivity and quality of the stream and Tomales Bay inconsistent with Sections 30230 and 30231. In addition, LUP New Development and Land Use Policy 6 and Zoning Code Section 22.56.130 (C) requires that development projects which involve the movement of earth in excess of 150 cubic yards implement various best management practices (BMPs) to prevent and control erosion and to protect water quality. As proposed, the project involves approximately 700 cubic yards of cut in fill.

To prevent impacts to the stream, wetland, and Tomales Bay consistent with Section 30230 and 30231 and in accordance with LUP New Development and Land Use Policy 6 and Zoning Code Section 22.56.130 (C), the Commission finds that temporary debris, erosion, and runoff control BMPs are necessary. Therefore, to protect the water quality and biological productivity of the stream and Tomales Bay, **Special Condition 12** requires the applicant to prepare and submit a construction period Water Quality Protection Plan (“WQPP”) for the review and approval of the Executive Director prior to the issuance of the permit. The WQPP must incorporate the specific BMPs outlined in the condition to prevent construction materials or debris from entering the Bay and minimize the potential sources of contaminants, pollutants, and sediment, control the amount of runoff, and retain sediment on-site during construction. BMPs include: (1) prohibiting development when the tide is at or above the elevation of the construction site, or if construction work on pilings is to occur below the low tide line, cofferdams shall be used to keep concrete contained until it is dry and cured in order to prevent the introduction of debris into the Bay; (2) requiring that all materials, debris and equipment to be removed from the lagoon mudflats on a daily basis, and requires disposal of all excavated materials outside of the Coastal Zone unless authorized under an approved coastal development permit to prevent debris from remaining in the mudflats after low tide and being inundated with water; (3) requiring the use of tarps, netting and other, similar containment devices to capture and contain debris and construction materials and prevent them from entering sensitive habitat or coastal waters; and (4) limit the application, generation, and migration of toxic substances and ensure the proper storage and disposal of toxic materials without causing significant nutrient runoff to Tomales Bay.

In addition, the proposed project includes the creation of various parking improvements. Even though the applicant proposes to use pervious materials, it is necessary to ensure that the proposed configuration does not increase surface erosion. Furthermore, LUP New Development and Land Use Policy 6 (f) requires that provisions be made to conduct surface water to storm drains or suitable watercourses to prevent erosion, drainage devices be designed to accommodate increased runoff resulting from modified soil and surface conditions as a result of development, and water runoff beyond natural levels be retained on site whenever possible to facilitate groundwater recharge. Therefore, **Special Condition 13** requires the applicant to submit a post-construction stormwater pollution prevention plan to control the volume, velocity, and pollutant load of stormwater on the developed site after project construction.

With these measures the proposed development would not significantly adversely affect the water quality and biological productivity of Tomales Bay. Thus, the Commission finds that the proposed development, as conditioned, would protect and enhance the habitat resources of

Tomales Bay, consistent with Coastal Act Policies 30230 and 20231, LUP New Development and Land Use Policy 6, and Zoning Code Section 22.56.130 (C).

#### **4.12 Stream Protection**

##### ***Coastal Act Policies***

Coastal Act Section 30236 states:

*Channelizations, dams, or other substantial alterations of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.*

As proposed, the application includes the placement of riprap on the embankment of the blueline stream in order to stabilize the bank (Exhibit 11, Proposed Riprap). Coastal Act Section 30236 limits channelizations of streams to the three enumerated purposes listed above and only where it incorporates the best mitigation measures feasible. The proposed bank stabilization is not necessary to protect existing development and does not otherwise qualify as one of the allowable uses listed in Section 30236. Furthermore, other alternatives exist such as soft erosion control measures using native vegetation. Therefore, **Special Condition 8** requires the applicant to submit for the review and approval of the Executive Director a revised Streamside Conservation Plan, Habitat and Enhancement Plantings, Precise Development Plan which eliminates the proposed riprap.

Therefore, the Commission finds that the proposed development, as conditioned to remove all riprap located within the stream, is consistent with Coastal Act Section 30236.

#### **4.13 Visual Resources**

##### ***LCP Policies***

LUP New Development and Land Use Policy (Visual Resources) 3(b):

*Development shall be screened with appropriate landscaping; however, such landscaping shall not, when mature, interfere with public views to and along the coast. The use of native plant material is encouraged.*

##### ***Discussion***

As proposed, the project includes the construction of two 10,000 gallon water storage tanks to be located adjacent to two existing 10,000 gallon water storage tanks (Exhibit 12, Existing & Proposed Water Tanks). LUP New Development and Land Use Policy (Visual Resources) 3(b) requires that development be screened with appropriate landscaping, as long as such landscaping does not, when mature, interfere with public views to and along the coast. While there are two existing water tanks of similar nature already on-site, the addition of two more tanks would

increase visual impacts. Since the proposed water tanks are located on the east side of Highway 1, any landscaping for the purposes of screening the water tanks would not interfere with public views to and along the coast. In accordance with LUP New Development and Land Use Policy (Visual Resources) 3(b), **Special Condition 11** requires the applicant to provide a revised landscaping plan for the review and approval of the Executive Director that includes native vegetation, which would screen the proposed water tanks.

Therefore, as conditioned to require screening of the proposed water tanks, the Commission finds that the proposed development is consistent with LUP New Development and Land Use Policy (Visual Resources) 3(b).

## **5.0 CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Section 13096 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available, which would substantially lessen any significant adverse effects, which the activity may have on the environment.

The Commission incorporates its findings on Coastal Act and Local Coastal Program consistency at this point as if set forth in full. The proposed project has been conditioned to be found consistent with the policies of the Coastal Act and Local Coastal Program and to minimize or eliminate all significant adverse environmental effects. Mitigation measures have been imposed to prevent impacts to agricultural resources, public access, wetlands, streams, environmentally sensitive habitat areas, visual, water quality and biological resources and protect against seismic, flood, or wave hazards. As conditioned, there are no feasible alternatives or feasible mitigation measures available, beyond those required, which would substantially lessen any significant adverse impacts, which the development may have on the environment. Therefore, the Commission finds that the proposed project can be found consistent with Coastal Act requirements to conform to CEQA.

---

## **EXHIBITS**

1. Location Map
2. Vicinity Map
3. Assessor Parcel Maps
4. Boundary Determination
5. Appeal by Commissioners Reilly and Woolley
6. Site Photographs
7. Plans and Cross-sections
8. Public Access Easements
9. Wetland Delineation Map
10. Memo from Dr. John Dixon
11. Proposed Stream Riprap
12. Existing & Proposed Water Tanks

## **APPENDIX A: SUBSTANTIVE FILE DOCUMENTS**

California Native Plant Society 2001. Web site [www.cnps.org/activities/natives.htm](http://www.cnps.org/activities/natives.htm).

Livingston 2000. A History of the Beachfront Cabins at Nick's Cove, Tomales Bay, California. September 13, 2000.

Renshaw 2001. Preliminary Environmental Assessment Nick's Cove Tomales Bay, Marin County California. June 28, 2001.

Renshaw 2003. Revised Identification and Delineation of Wetland Areas in Accordance with the California Coastal Act of 1996, Nick's Cove, Tomales Bay, Marin County California. October 28, 2003

US Fish and Wildlife Service (USFWS) 1997. Guidance on Site Assessment and Field Surveys for California Red-legged Frogs (*Rana aurora draytonii*). February 18, 1997.